

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

AUG 21 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANANT KUMAR TRIPATI,

Plaintiff/Appellant,

v.

REGINA TOLANO MARTINEZ,
et al.,

Defendants/Appellees.

2 CA-CV 2008-0019
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200700396

Honorable William J. O'Neil, Judge

AFFIRMED

Anant Kumar Tripathi

Douglas
In Propria Persona

ESPINOSA, Judge.

¶1 Anant Tripathi appeals from the trial court's order dismissing his civil rights action for his failure to prosecute. We affirm.

Facts and Procedural History

¶2 In February 2007, Tripati, an Arizona Department of Corrections (ADOC) inmate, filed a lawsuit under 42 U.S.C. § 1983, against several ADOC employees, complaining of their failure to provide him with an individualized diet. He also filed an application for deferral or waiver of his court fees, which the trial court denied. Tripati sent copies of his complaint to the Pinal County sheriff's office to serve upon the defendants. When these documents were returned for failure to pay the required fee, he filed a motion to extend time for service of process. In July 2007, the court granted Tripati's motion and gave him until October 29, 2007, to complete service.

¶3 In August 2007, Tripati filed a handwritten "request for sheriff to serve due to nonwaiver." The legible portion of the document stated Tripati had asked the defendants to waive service of process but had received no response. Tripati therefore asked the trial court to order the sheriff to serve the summons. The court refused, noting the complaint lacked merit as against the named defendants, who could not be sued individually. The court placed the case on the inactive calendar and scheduled it for automatic dismissal on December 10, 2007. Between August and December 2007, Tripati made no additional efforts to advance the case, neither amending his complaint to substitute ADOC for the named individual defendants nor attempting to serve the summons. On December 19, 2007, Tripati filed a "motion to vacate and for other relief" and requested an order that ADOC provide him access to a typewriter. The court denied this motion, finding Tripati had not presented good cause

to further extend the matter on the calendar. Tripati filed a final motion under Rule 59(a)(1), (3), (6), and (8), Ariz. R. Civ. P., in which he asserted without discussion that the dismissal should be vacated because of the “irregularities” described in his December 19 motion to vacate.¹ In January 2008, the trial court signed an order dismissing the action pursuant to Rule 38.1(d), Ariz. R. Civ. P., for failure to prosecute. Tripati filed a timely notice of appeal.²

Discussion

¶4 We will not disturb a trial court’s order dismissing an action for failure to prosecute except for an abuse of discretion. *Cooper v. Odom*, 6 Ariz. App. 466, 469, 433 P.2d 646, 649 (1967). “An ‘abuse of discretion’ is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Quigley v. City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

¶5 Rule 38.1(d) provides:

The clerk of the court or court administrator shall place on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness has not been served within nine months after the commencement thereof. . . . All cases remaining on the Inactive Calendar for two months shall be dismissed without prejudice for lack of prosecution . . . unless prior to the expiration of such two months period:

¹Tripati’s motion stated it was filed pursuant to Rule 59(a)(1), (3), (6), and (8) but it contains no discussion of subsections (a)(3), (6), or (8).

²Although the dismissal was without prejudice, we have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B). *See Filer v. Tohono O’Odham Nation Gaming Enter.*, 212 Ariz. 167, ¶ 4, 129 P.3d 78, 80 (App. 2006).

. . . .

2. the court, on motion for good cause shown, orders the case to be continued on the Inactive Calendar for a specified period of time without dismissal.

Tripati's sole argument on this issue is that his attempts to have the Pinal County Sheriff serve process on the defendants constituted diligent prosecution of his case.³ We find this contention unpersuasive. Under Rule 38.1(d), placement on the Inactive Calendar and subsequent dismissal are automatic when a Motion to Set and Certificate of Readiness has not been timely served. The plaintiff bears the burden of showing good cause to extend the time for filing a motion to set, and Tripati failed to meet this burden.

¶6 The only justifications Tripati has offered for needing additional time were his lack of access to a typewriter and his inability to serve the defendants. But the circumstances surrounding the underlying failure to prosecute were entirely within Tripati's control. When the trial court refused to order the Pinal County Sheriff to serve the named defendants, Tripati chose neither to amend his complaint nor to attempt other means of serving the defendants. He does not explain how his lack of access to a typewriter played any part in these failures. Furthermore, his inability to effect service was at least partially the result of his own election not to name appropriate defendants. A plaintiff's "failure to take the steps

³Tripati also attached a number of exhibits to his opening brief related to his allegations on appeal that certain state officials and judicial officers are acting in collusion to deny him his rights. We do not consider exhibits attached to appellate briefs that are not contained in the record. Moreover, these claims are unrelated to the issue ruled on by the trial court and have no bearing on the disposition of this appeal.

necessary to remove the one obstacle in [his] path demonstrates a singular *lack of diligence* in pursuit of the case.” *Mission Ins. Co. v. Cash, Sullivan & Cross*, 170 Ariz. 105, 108, 822 P.2d 1, 4 (App. 1991), *disapproved on other grounds by Panzino v. City of Phoenix*, 196 Ariz. 442, 999 P.2d 198 (2000). Accordingly, we cannot say the trial court abused its discretion in dismissing this case for Tripati’s failure to prosecute.

Disposition

¶7 The order of dismissal is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge